

SPENCER FANE BRITT & BROWNE LLP
ATTORNEYS AND COUNSELORS AT LAW

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REC'D
MAR 22 1999
RCAP

File No. 4220000/2

March 19, 1999

Via Hand Delivery and U.S. Mail

Mr. Kenneth V. Herstowski
RCRA Corrective Action and Permits Branch
Air, RCRA, and Toxics Division
United States Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101


R00123496
RCRA RECORDS CENTER

RE: T H Agriculture & Nutrition, L.L.C.
Comments on RCRA Facility "Background Information Document"
5220 Speaker Road, Kansas City, Kansas
RCRA ID# KSD099239717

Dear Mr. Herstowski:

Spencer Fane Britt & Browne LLP is writing on behalf of T H Agriculture & Nutrition, L.L.C. ("THAN"). THAN received your letter dated January 19, 1999 and the above-referenced "Background Information Document" ("BID") regarding the closed surface impoundment (also known as the "overflow pond") at 5220 Speaker Road¹, Kansas City, Kansas. As requested in your letter, THAN provides the following comments and information for inclusion in your file and the administrative record.

¹ The correct address of the former surface impoundment is 5020 Speaker Road. The 5220 Speaker Road address is the address associated with THAN's former business office.

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Mr. Kenneth V. Herstowski
March 18, 1999
Page 2

In the BID; the Environmental Protection Agency's ("EPA's") contractor discusses the history of the closed overflow pond, but the contractor fails to include critical information that would complete the history. Although the last activity and date discussed in the BID is the May 1988, THAN closure of the overflow pond pursuant to an EPA and Kansas Department of Health and Environment ("KDHE") approved closure plan (BID, page 6), THAN has conducted several years of groundwater sampling since then. Based on the groundwater sampling results, the KDHE has determined that the closed overflow pond does not adversely affect the groundwater.

Since the 1988 THAN closure of the overflow pond, THAN and the KDHE conducted meetings and corresponded regarding the necessity of groundwater monitoring at the closed overflow pond and whether the facility ever achieved interim status (see Attachment A). Without conceding that the facility achieved interim status, THAN, at KDHE's request and on a voluntary basis, agreed to conduct groundwater monitoring and collected several rounds of analytical data over a period of several years subsequent to the pond closure.

In April 1995, THAN received a letter from Miles Stotts, the Chief of KDHE's Technical Support Section of the Bureau of Waste Management, acknowledging that (1) groundwater monitoring was "not required by state or federal regulations," (2) THAN installed a groundwater monitoring system on a "voluntary basis," which THAN monitored for "several years," and (3) the analysis conducted by the KDHE of split samples from the September 1994 sampling event "indicated that the surface impoundment area is not adversely affecting groundwater beneath the site." The letter concluded by authorizing THAN to "cease groundwater monitoring" of the facility (see Attachment B). This letter and its determinations should be described in Section 2.2, Facility History, of the BID. Moreover, Section 4.3, History of Release, should state that the KDHE concluded that the overflow pond is not adversely affecting the groundwater.

As stated in the BID, the surface impoundment was included in the Thompson-Hayward Chemical Company's ("THCC") original RCRA Part A permit request in November 1980 as an overflow pond for the aeration lagoon. After the sale of the 5200 Speaker Road property, where the aeration lagoon was located, THAN, at the request of the KDHE, independently filed a protective RCRA Part A application for the overflow pond located at 5020 Speaker Road because it was not included in the sale. In 1984, this application was terminated at THAN's request because the overflow pond had been inactive since RCRA regulations went into effect, and the facility never qualified for interim status. THAN subsequently conducted a clean closure of the overflow pond under EPA and KDHE supervision in 1988.

During the time period between 1984 and 1988, there were many communications between THAN and the KDHE regarding the applicability of RCRA rules to the closed surface impoundment. Letters between THAN, or THAN's counsel, and the KDHE are included as Attachment A to this

Mr. Kenneth V. Herstowski
March 18, 1999
Page 3

letter, which explain that because the overflow pond did not receive waste after 1978, the facility was not an active unit on or after November 19, 1980, the effective date of the RCRA regulatory requirements. Accordingly, the facility never qualified for interim status and is not subject to RCRA regulatory requirements for interim status facilities.

To put to rest any issues regarding the regulatory status of the closed overflow pond, however, THAN met with the KDHE in 1994 to discuss the steps necessary to ensure that no additional activities were required regarding monitoring the closed pond and to verify that THAN could close the four monitoring wells on the property if it so desired. THAN and the KDHE agreed to perform an additional round of groundwater sampling and analysis from the four wells. This sampling was performed, under the KDHE oversight, in September 1994. Analytical samples were split with KDHE during the sampling event. Following the KDHE's analysis of the split samples, it issued the letter referenced above from Mr. Stotts concluding that the former overflow pond has no adverse impact on groundwater and authorizing THAN to discontinue groundwater monitoring.

Accordingly, because THAN has completed all work required by the KDHE to close the overflow pond and because it was never active after November 19, 1980, the BID should reflect that (1) the facility did not achieve interim status; (2) the overflow pond was closed in 1988, in accordance with KDHE and EPA requirements for clean closure (BID, page 6); (3) subsequent groundwater monitoring, voluntarily performed by THAN, has demonstrated that the former overflow pond is not adversely affecting groundwater (KDHE, 1995); and (4) no further action is required regarding the overflow pond.

If THAN can be of further assistance in this matter, please contact me at the above listed number.

Very truly yours,



Michael D. Hockley

MDH:trc

cc: Robert F. Wells
Risa Weinstock, Esq.
Leslie Humphrey, Esq. (Office of Regional Counsel, U.S. E.P.A. Region VII)

Attachment A

Prior Correspondence with KDHE

MORGAN, LEWIS & BOCKIUS

PHILADELPHIA
NEW YORK
LOS ANGELES

COUNSELORS AT LAW
1800 M STREET, N. W.
WASHINGTON, D. C. 20036
TELEPHONE: (202) 872-5000

MIAMI
HARRISBURG
LONDON

KENNETH A. RUBIN
DIAL DIRECT (202) 872-7612

June 20, 1985

Mr. Thomas Gross, Chief
Field Services Section
Division of Environment
Bureau of Environmental Sanitation
State of Kansas
Department of Health
and Environment
Topeka, Kansas 66620

Dear Tom:

I am writing in response to our meeting in your office on June 12, 1985 and your subsequent telephone conversation with me on June 18, 1985, regarding the status of the surface impoundment located on the TH Agricultural and Nutrition Company property. While I am tempted to explore the entire history of the facility with you, I would, for the purposes of this letter, like to focus on an issue you raised during the phone call regarding whether the impoundment located at the site has interim status; in particular, whether the impoundment was active after November 19, 1980.

As you know, THAN filed a notification, under section 3010 of the Resource Conservation and Recovery Act, and a Part A application at the request of the state and EPA. While at first glance, it would appear that the THAN impoundment has interim status simply as a consequence of those submissions, closer examination of the facts and the pertinent regulations reveals that the THAN site does not have interim status. Under separate cover, you will be receiving a letter from THAN withdrawing its Part A and section 3010 notification, on the grounds that it was a protective filing made in error.

The applicable regulations relating to the acquisition of interim status were published on May 19, 1980, and amended on November 19, 1980. The language was

subsequently recompiled in Part 270 of EPA's regulations. The pertinent language appears in 40 CFR section 270.70 entitled "Qualifying for Interim Status."

This regulation imposes the following requirements to obtain interim status: the applicant must (1) own or operate an "existing hazardous waste management facility" and (2) submit notification under section 3010 of RCRA and a Part A application. To determine whether a facility was in existence, EPA requires one to show it was in active use. The THAN pond has been inactive since 1978.

No doubt you will ask why THAN filed a Part A and a section 3010 notification if the facility was inactive and not entitled to interim status. The answer is simple: the company was confused about the regulatory requirements and was seeking to follow a request from EPA and KDHE. At the time these documents were filed, no one at the company appreciated the legal significance of the unavailability of interim status for an inactive facility. I am sure you will admit that EPA's regulatory program under RCRA is extremely confusing, especially to the regulated community. EPA itself recognized that many companies filed documentation to obtain interim status to protect themselves in case it was required, even though they had questions about the need to make such a filing. This is made clear in the November 19, 1980 Federal Register at page 76635, where EPA states:

We have been advised that a number of facilities which are not now subject to EPA's hazardous waste regulations have filed "protective" notifications and permit applications to comply with EPA's May 19, 1980, Part 122 [now Part 270] regulations and thus assure that they will be able to obtain interim status in the future (if necessary). Many of these filings may not be necessary under today's revised regulations.

On the preceding page in that Federal Register notice, EPA provided several examples of practical application of these regulations to different situations. Example 4 discussed a landfill which did not receive any wastes after November 19, 1980 but several years later,

prompted by a change in EPA's level of exemption for small quantity generators, decides to "reactivate its on-site landfill." (emphasis added). This example makes clear that the facility was not considered active after November 19, 1980. It only became active when it received additional waste.

This discussion in the November 19, 1980 Federal Register thus confirms that the surface impoundment owned by THAN was not active after November 19, 1980, and thus not entitled to interim status.

With respect to the basic facts, there is no disagreement between the state and THAN that no wastes were added to the surface impoundment between November 19, 1980 and now. It is my understanding from your telephone conversation with me earlier this week, that you believe that because the facility was a surface impoundment, rather than a landfill, it was nonetheless considered active even though nothing was added to it after November 19, 1980. You based this interpretation upon a letter from John Skinner of EPA to Thomas Devine in EPA Region IV dated August 17, 1983 which you apparently had just heard about at the time of our conversation, but which you had not yet actually read. Since our phone call, I have seen the actual text of this letter. As you explained it to me, it is your understanding that John Skinner made a distinction between a storage facility and a landfill, finding that a landfill is for permanent disposal but a storage facility is only an interim measure in anticipation of further action. Apparently you thought Skinner's letter said a surface impoundment is by definition a storage facility. This is not true. Indeed, the final sentence on page one of Skinner's letter reads:

If, however, the placement of waste in the surface impoundment or waste pile occurred before November 19, 1980, and such placement constituted final disposal, the interim status requirements would not apply to the facility unless the owner or operator engaged in significant management activities after November 19, 1980.

Likewise, EPA's regulations make clear that a surface impoundment is for all practical regulatory purposes considered a landfill for permanent disposal where wastes remain in the surface impoundment after closure. For example, 40 CFR section 265.228(c) states in pertinent part that:

If the owner or operator [of a surface impoundment] does not remove all the impoundment materials. . . he must close the impoundment and provide for post-closure care as for a landfill under subpart G in section 265.310.

It is undisputed that if the surface impoundment was a landfill that it would have been considered inactive as of November 18, 1980 and would not be subject to RCRA interim status requirements. Because the company had no intention of adding wastes to the surface impoundment after that time, it was equivalent to an inactive landfill and thus inactive within the meaning of RCRA and not subject to any interim status requirements.

As I have said to you on an earlier occasion, I believe THAN has a substantial case to raise in defense against any enforcement action that might be contemplated by the Kansas Department of Health and Environment and EPA regarding the applicability of RCRA to this facility as an interim status facility. THAN, however, does not wish to press this issue to the point of litigation and seeks to work out a reasonable compromise with your office and EPA leading to an appropriate cleanup of the site. With this in mind, I am hopeful that we can continue our dialogue regarding any differences which may remain with respect to interpretations of the applicable regulations without resort to any unilateral enforcement action. I think a lot more can be accomplished by working together than through an adversary proceeding.

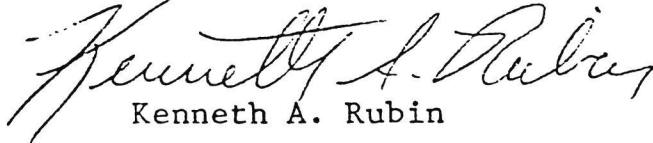
In this regard, please keep in mind that THAN is ready to transport the impounded wastes to any appropriate disposal site acceptable to KDHE. Such a cleanup is more than is required and all we ask is for the cooperation of

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KDHE and the United States Environmental Protection Agency
to help us locate a suitable site.

Sincerely yours,


Kenneth A. Rubin

KAR:gaf

P.S. I am leaving for vacation on June 25. I was hoping we could resolve any outstanding issues by that date, but this appears unlikely. In my absence, please direct all telephone calls and correspondence regarding this matter to my partner, John Quarles. John is located at my address. His direct telephone number is (202) 872-5118.

MORGAN, LEWIS & BOCKIUS

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TOKYO

MICHAEL W. STEINBERG
DIAL DIRECT (202) 467-7141

January 30, 1991

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Martin L. West
Environmental Geologist
Hazardous Waste Section
Bureau of Air and Waste Management
Kansas Department of Health & Environment
Forbes Field
Topeka, KS 66620-0001

Re: TH Agriculture and Nutrition Company, Inc. ("THAN")

Dear Mr. West:

I am writing on behalf of TH Agriculture and Nutrition Company, Inc. ("THAN") in response to your January 22, 1991 letter (copy enclosed) regarding the submission of ground water monitoring reports for calendar year 1990 by certain interim status hazardous waste management facilities regulated under the Resource Conservation and Recovery Act of 1976 ("RCRA"). Your letter requested that THAN submit such a report by March 1, 1991 for the closed surface impoundment in Kansas City, Kansas.

Based on past discussions with the Kansas Department of Health and Environment, it appears that your January 22 letter may have been sent as a routine "reminder" letter to various companies listed in a KDHE file of RCRA-regulated TSD facilities that are operating under interim status. In any event, the closed THAN surface impoundment in Kansas City, Kansas is not a RCRA-regulated TSD facility and thus is not subject to the ground water monitoring and reporting requirements referenced in your letter.

THAN has consistently taken this position in its previous communications with both the EPA Region VII office and the KDHE. To briefly restate some of the more recent history: In 1985, THAN submitted signed affidavits to EPA Region VII documenting that the surface impoundment was not used to manage hazardous waste after November 19, 1980. In 1986, EPA Region VII advised KDHE that there was insufficient evidence to suggest that the surface impoundment was "active" after November 19, 1980 and thus subject to RCRA regulation. In 1987, THAN closed the surface

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Mr. Martin L. West
January 30, 1991
Page 2

impoundment pursuant to KDHE approval and then certified that closure was complete. KDHE later advised THAN that the closure had been completed to its satisfaction.

Although THAN has voluntarily submitted certain ground water monitoring data pertaining to the closed surface impoundment, THAN has respectfully maintained that the unit is not subject to the RCRA hazardous waste ground water monitoring regulations for interim status facilities. Because the issue of the unit's status under RCRA has come up from time to time, THAN has offered to provide any additional information that KDHE might require in order to help put this issue to rest. Most recently, in August of 1989 and again in January of 1990, Mr. John Paul Goetz of KDHE agreed that THAN need not undertake any further ground water monitoring activities until this issue had been resolved. THAN had heard nothing further from KDHE prior to your letter of January 22, 1991.

In conclusion, THAN continues to believe that the closed surface impoundment is not subject to the RCRA hazardous waste ground water monitoring regulations. Please communicate directly with the undersigned if you have any questions regarding this letter or would like any additional information.

Sincerely,


Michael W. Steinberg

enc.

4500
KC-Pond

MORGAN, LEWIS & BOCKIUS

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MICHAEL W. STEINBERG
DIAL DIRECT (202) 467-7141

February 21, 1992

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Steven L. Travis
Environmental Geologist
Hazardous Waste Section
Bureau of Air and Waste Management
Kansas Department of Health & Environment
Forbes Field
Topeka, KS 66620-0001

Re: T H Agriculture & Nutrition Company, Inc. ("THAN")

Dear Mr. West:

I am writing on behalf of T H Agriculture & Nutrition Company, Inc. ("THAN") in response to your January 31, 1992 letter (copy enclosed) regarding the submission of ground water monitoring reports for calendar year 1991 by certain interim status hazardous waste management facilities regulated under the Resource Conservation and Recovery Act of 1976 ("RCRA"). Your letter requested that THAN submit such a report by March 1, 1991 for the closed surface impoundment in Kansas City, Kansas.

Based on past discussions with the Kansas Department of Health and Environment, it appears that your January 31 letter may have been sent as a routine "reminder" letter to various companies listed in a KDHE file of RCRA-regulated TSD facilities that are operating under interim status. In any event, the closed THAN surface impoundment in Kansas City, Kansas is not a RCRA-regulated TSD facility and thus is not subject to the ground water monitoring and reporting requirements referenced in your letter.

THAN has consistently taken this position in its previous communications with both the EPA Region VII office and the KDHE. To briefly restate some of the more recent history: In 1985, THAN submitted signed affidavits to EPA Region VII documenting that the surface impoundment was not used to manage hazardous waste after November 19, 1980. In 1986, EPA Region VII advised KDHE that there was insufficient evidence to suggest that the surface impoundment was "active" after November 19, 1980 and thus subject to RCRA regulation. In 1987, THAN closed the surface

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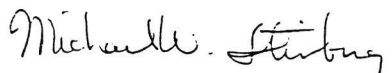
Mr. Steven L. Travis
February 21, 1992
Page 2

impoundment pursuant to KDHE approval and then certified that closure was complete. KDHE later advised THAN that the closure had been completed to its satisfaction.

Although THAN has voluntarily submitted certain ground water monitoring data pertaining to the closed surface impoundment, THAN has respectfully maintained that the unit is not subject to the RCRA hazardous waste ground water monitoring regulations for interim status facilities. Because the issue of the unit's status under RCRA has come up from time to time, THAN has offered to provide any additional information that KDHE might require in order to help put this issue to rest. Most recently, in August of 1989 and again in January of 1990, Mr. John Paul Goetz of KDHE agreed in discussions with the undersigned that THAN need not undertake any further ground water monitoring activities until this issue had been resolved.

In conclusion, THAN continues to believe that the closed surface impoundment is not subject to the RCRA hazardous waste ground water monitoring regulations. Please communicate directly with the undersigned if you have any questions regarding this letter or would like any additional information.

Sincerely,


Michael W. Steinberg

enc.

Attachment B
1995 Correspondence

T H AGRICULTURE & NUTRITION COMPANY, INC.

15313 West 95th Street
Lenexa, Kansas 66219
(913) 888-2922 (913) 888-0255 - FAX

January 18, 1995

Mr. Steve Travis
Environmental Geologist
Hazardous Waste Section
Bureau of Air and Waste Management
Kansas Department of
Health and Environment
Forbes Field, Bldg. 740
Topeka, Kansas 66620-0001

RE: Analytical Data From Groundwater Samples
5020 Speaker Road
Kansas City, Kansas

Dear Mr. Travis:

In September of this year, T H Agriculture & Nutrition Company, Inc. (THAN) sampled four monitoring wells surrounding the former impoundment at the above referenced location. The sampling was performed by Burns & McDonnell, with split samples collected by you for the Kansas Department of Health and Environment (KDHE).

Attached are fully validated analytical data from the groundwater samples collected by Burns & McDonnell. The samples were analyzed by IEA of Research Triangle Park, North Carolina, for Semi-Volatile Organic Compounds (SVOCs), Volatile Organic Compounds (VOCs), Organochlorine Pesticides (OCLs), Herbicides, Metals, and various other parameters requested by KDHE. Methodology of analyses were in accordance with EPA SW-846 procedures, as specified in the Harcros Chemicals Inc RFI Workplan and the approved THAN closure plan for the former lagoon.

Also attached is a copy of the field notes taken by Burns & McDonnell which pertain to the sampling of the four monitoring wells along with the associated well development records.

As the attached analytical data summary indicates, there were no compounds indicated in the samples in other than trace amounts, disregarding those compounds identified as laboratory artifacts.

THAN believes that the attached data demonstrate that groundwater contamination from the former lagoon at this

Mr. Steve Travis
KDHE
January 18, 1995
Page 2

location is not an issue and further monitoring is not necessary.

If you have any questions or comments regarding the above, please call me at (913) 888-2922.

Very truly yours,
T H AGRICULTURE & NUTRITION COMPANY, INC.



John P. Cleary, P.E.
Project Manager

JPC/js

cc: John Mitchell - KDHE
Bob Wells - THAN

4400

State of Kansas

Bill Graves



Governor

APR 07 1995

Department of Health and Environment

James J. O'Connell, Secretary

April 4, 1995

Mr. John P. Cleary
Project Manager
T H AGRICULTURE & NUTRITION COMPANY, INC.
15313 West 95th Street
Lenexa, Kansas 66219

Dear Mr. Cleary:

The purpose of this letter is to clarify the regulatory status of groundwater monitoring of the former surface impoundment at the THAN facility. As you are aware, there has been confusion related to this matter over the past several years.


A June 15, 1984 letter from KDHE to Woodward-Clyde Consultants, who had submitted a closure plan for the surface impoundment on behalf of THAN, stated that "since the surface impoundment did not receive hazardous waste after January 26, 1983 post closure ground water monitoring is not required by state or federal regulations. However, if you wish to install the system we would not object".

THAN did install the system and has been monitoring it on a voluntary basis for several years. This demonstrates the concern and environmental consciousness of your company and you should be commended for this effort.

In September of 1994, KDHE requested to split samples with THAN during your sampling event. Thank you for the opportunity to do so. The analysis from those samples indicated that the surface impoundment area is not adversely affecting the ground water beneath the site.

THAN may cease ground water monitoring at the surface impoundment area, however, THAN may continue to monitor at your discretion. We trust that this letter clears up this matter. Should you have any questions, please contact me at the number below.

Sincerely,


Miles Stotts, Chief
Technical Support Section
Bureau of Waste Management

cc: Wes Bartley
John Mitchell

Mary Bitney
NEDO